FILED
JUL 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-66

No. _____

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1989

JAMES LINDSTROM, KARLA LINDSTROM, TIMOTHY R. MCGOWAN, and ADELE MCGOWAN,
PETITIONERS,

v.

EDWIN H. ALLEN and WENDY L. ALLEN,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Timothy R. McGowan

Petitioner

2548 Five Oaks Rd.
Vienna, VA 22181

(703)827-3940

July 17, 1989

QUESTIONS PRESENTED

1. Whether the Virginia Supreme Court violated the purpose and plain language of the Fourteenth Amendment to the Constitution of the United States by granting an appeal that failed to properly comply with Rule 5:11 of the Rules of the Virginia Supreme Court?

2. Whether the Virginia Supreme Court erred in relying on transcripts provided in violation of Rule 5:11 of the Rules of the Virginia Supreme Court in determination of the final opinion?

3. Whether the Supreme Court of Virginia denied the Petitioners' right of due process in not considering the Findings of Fact and Conclusions of Law of the Virginia Real Estate Board?

LIST OF PARTIES

The parties to the proceedings below were as follows:

James Lindstrom, Karla Lindstrom, Timothy R. McGowan and Adele M. McGowan, petitioners;

Edwin H. Allen and Wendy L. Allen, respondents.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
I. This Petition for Certiorari Should be Granted Because the Supreme Court of Virginia Violated Petitioners' rights under the Rules of the Supreme Court of Virginia	3
II. This petition for Certiorari should be granted because the Supreme Court of Virginia violated the Petitioners' rights of Due Process by relying upon transcripts presented to the Virginia Supreme Court in violation of Rule 5:11 of the Supreme Court of Virginia.	4
III. This petition for Certiorari should be granted because the Supreme Court of Virginia violated Petitioners' rights of due process in failing to take under consideration the findings of the Virginia Real Estate Board.	4
CONCLUSION	5

TABLE OF AUTHORITIES

Cases:	Page
Field v. Boyle, C.A. Ill. 1974, 503 F. 2d 774	3
Horn v. O'Cheskey, D.C. N.M. 1974, 378 F Supp 1280	4
Towler v. Commonwealth of Virginia et al., 216 Va 533, 221 S.E. 2d 119 (1976)	3

Statutes:

Code of Virginia, Rules of the Virginia Supreme Court (1986)	2, 4
Code of Virginia, §9-6.14.1	4
Code of Virginia, §9-14.14	4
Code of Virginia, §54-737	4
Code of Virginia, §54-745	4

No. _____

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OCTOBER TERM, 1989

JAMES LINDSTROM, KARLA LINDSTROM, TIMOTHY R. MCGOWAN, and ADELE MCGOWAN,
Petitioners,

v.

EDWIN H. ALLEN and WENDY L. ALLEN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners James Lindstrom, Karla Lindstrom, Timothy R. McGowan and Adele M. McGowan respectfully pray that a writ of certiorari issue to review the judgement and opinion of the Supreme Court of Virginia in Edwin H. Allen, et al. v. James Lindstrom, et al., issued on April 21, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia was issued the 21st of April, 1989 and is reproduced verbatim in Appendix A.

JURISDICTION

The decision of the Supreme Court of Virginia was decided on April 21, 1989. The jurisdiction of this Court to review the judgement of the Supreme Court of Virginia in invoked persuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV of the United States Constitution is involved in the instant case.

STATEMENT OF THE CASE

By this Petition, this Court is asked to review a decision of the Supreme Court of Virginia in granting the appeal of Edwin H. Allen, et al. v. James Lindstrom, et al., as well as the final opinion of the Court.

Background

In April 1986 Edwin H. Allen, et al. was denied specific performance on a contract to purchase real estate in the Commonwealth of Virginia. A Petition for Appeal was filed with the Virginia Supreme Court on the 28th of July, 1986. Rule 5:11(b)

of the Virginia Supreme Court required counsel for the appellants to promptly notify all other counsel of the date on which the transcript is filed. This was never done by the appellants counsel.

Compliance with the Rule is mandatory and failure to comply constitutes a jurisdictional bar to prosecution of the appeal. *Towler v. Commonwealth*, 216 Va. 533, 221 S.E. 2d 119 (1976).

This question was raised before the Virginia Supreme Court in the Motion to Dismiss Petition for Appeal before the appeal was perfected. A copy of this motion is in Appendix A. The motion was denied.

By not notifying counsel of the filing of the transcripts, the witnesses were denied a proper opportunity to correct errors in transcription within a reasonable time after the testimony was given.

The Virginia Supreme Court granted the Petition for Appeal. They relied upon the testimony with the uncorrected transcripts as a basis for the conclusions in the final opinion.

The conclusions are diametrically opposed to the findings of the Judge of the hearings. The Judge relied on the direct testimony of the witnesses; and the witness' demeanor during the proceedings. The conclusions of the Virginia Supreme Court are also contrary to the findings of the Virginia Real Estate Board. The Virginia Real Estate Board held a series of independent investigations and hearings.

REASONS FOR GRANTING THE WRIT

I. This Petition for Certiorari should be granted because the Supreme Court of Virginia violated petitioners' rights under the Rules of the Supreme Court of Virginia.

States have a right to establish their own rules of law. However, when a state fails to follow its own rules of law, a question of Due Process under Amendment XIV is raised. *Field*

v. Boyle, C.A. Ill. 1974, 503 F.2d 774. State courts bear an equal responsibility with federal courts to guard and protect the rights secured by the Constitution of the United States. *Horn v. O'Cheskey*, D.C. N.M. 1974, 378 F. Supp. 1280. By granting the Petition for Appeal, the Virginia Supreme Court failed to enforce its own rules and violated the petitioners' right of Due Process and should be reversed.

II. This petition for Certiorari should be granted because the Supreme Court of Virginia violated the Petitioners' rights of Due Process by relying upon transcripts presented to the Virginia Supreme Court in violation of Rule 5:11 of the Supreme Court of Virginia.

Rule 5:11 stipulates that all counsel be advised of the filing of the transcripts. By breaching this Rule, the witnesses were denied a timely opportunity to correct errors in their testimony.

Reliance on this potentially incorrect transcript by the Virginia Supreme Court in reaching their final opinion violated the petitioners' right of Due Process. The opinion of the Virginia Supreme Court contains incorrect descriptions of the events and their order of occurence. The Virginia Supreme Court should be compelled to rely upon the findings of the Judge, the finder of fact, at the time the testimony was given. The opinion of the Virginia Supreme Court should be reversed.

III. This petition for Certiorari should be granted because the Supreme Court of Virginia violated Petitioners' rights of due process in failing to take under consideration the findings of the Virginia Real Estate Board.

The Virginia Real Estate Board is an agency of the state empowered to make regulations or decide cases related to licensed real estate professionals. Va. Code Section 54-737, Va. Code Section 9-6.14.1. As an agency, its final decisions are subject to judicial notice by all courts and agencies. Va. Code

Section 54-745, Va Code Section 9-14.14.

Between 1985 and 1989 the Virginia Real Estate Board held a series of independent investigations and inquiries. On January 9, 1989, the final ruling of the Virginia Real Estate Board found eight (8) violations of regulations by the real estate professionals in bringing about theAllen contract.

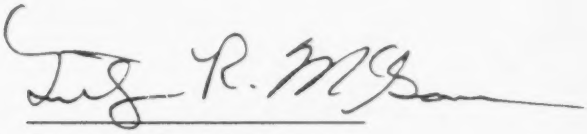
The Supreme Court of Virginia was asked to take notice of the findings of the Virginia Real Estate Board by a Motion to Take Judicial Notice on the 17th of February, 1989.

The Supreme Court of Virginia erred in not considering the Findings of Fact and Conclusions of Law of the Virginia Real Estate Board in its determination that no fraud or misrepresentation existed in the Allens' contract.

CONCLUSION

For these various reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Timothy R. McGowan
PETITIONER

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APPENDIX

INDEX TO APPENDIX

Page(s)

Opinion of the Supreme Court of Virginia A-1

Motion to Dismiss Petition for Appeal in the Supreme Court of Virginia A-14

Letter Opinion of Circuit Court Judge A-25

Findings of Fact and Conclusions of Law of the Virginia Real Estate Board A-29

IN THE SUPREME COURT OF VIRGINIA

No. 860675
861158
861034

Edwin H. Allen, ET AL.

Respondents – Appellants,

–versus–

James Lindstrom, ET AL.

Petitioners – Appellees.

Opinion of the Supreme Court of Virginia

(April 21, 1989)

PRESENT: All the Justices

EDWIN H. ALLEN, ET AL.

v. Record No. 860675

JAMES LINDSTORM, ET AL.

OPINION BY JUSTICE A. CHRISTIAN COMPTON

April 21, 1989

EDWIN H. ALLEN, ET AL.

v. Record No. 861158

JAMES LINSTROM, ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
John J. Karcha, Judge Pro Tempore

TIMOTHY R. McGOWAN, ET AL.

v. Record No. 862034

COLDWELL BANKER RESIDENTIAL REAL ESTATE SERVICES, INC., ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
J. Howe Brown, Jr. Judge

In this opinion, we decide appeals of three cases arising from a controversy over the purchase of one parcel of land. The main issues are whether the trial court properly denied a purchasers' request for specific performance and whether a real estate agent owes a duty to a prospective purchaser to communicate a purchase offer to a seller for whom the agent was acting as the exclusive real estate broker.

The basic facts as they relate to the material proceedings in the case are undisputed. In December 1984, James Lindstrom and Karla Lindstrom, his wife, owned a parcel of undeveloped, residential real estate in Fairfax County described as Lot 33, Acredale Subdivision. They decided to sell the property and listed it with Coldwell Banker Residential Real Estate Services, Inc., through its Vienna branch office.

Subsequently, Edwin H. Allen and Wendy L. Allen, his wife, and Timothy R. McGowan and Adele M. McGowan, his wife, became interested in purchasing the property. A flurry of negotiations ensued between the sellers and the Allens, and between the sellers and the McGowans.

On March 19, 1985, the Allens and the sellers executed a sales contract. The total purchase price was $68,000 with closing to occur on August 1, 1985. On May 13, 1985, the McGowans and the sellers executed a sales contract for the property, which was conveyed by the sellers to the McGowans on July 31, 1985 for $72,000.

On August 16, 1985, the Allens filed a bill of complaint (the first case) against the sellers and the McGowans seeking to set aside the the conveyance for specific performance of the Allen contract. Contemporaneously, the Allens recorded in the clerk's office of the court below a lis pendens against the property. In September 1985, the McGowans began clearing the lot and prepared to build a home on the site.

On September 20, the Allens filed another bill of complaint (the second case) against only the McGowans for a temporary injunction to prevent "any further clearing work, or any con-

struction work" on the property until the issues were decided in the first case. On October 11, the trial court entered the injunction requested and required the Allens to post a bond "to hold harmless" the McGowans from any damages resulting from the injunction. In February 1986, the trial court conducted an ore tenus hearing on issues raised in the first and second cases.

In March 1986, the McGowans filed a motion for judgment (the third case) against Coldwell Banker and Max R. Rush, a licensed real estate agent working for Coldwell Banker in the Vienna office. The McGowans sought recovery in damages for alleged wrongful conduct in failing to transmit to the seller one of the offers made by the McGowans to purchase the property.

In April 1986, the trial court announced its ruling that the Allens were not entitled to specific performance and entered an order to that effect. On May 27, 1986, the chancellor entered an order, based on the agreement of counsel, vacating the temporary injunction and releasing the lis pendens. Three days later, the trial court conducted a hearing on the McGowans' claim for damages against the Allens resulting from the granting of the temporary injunction.

In August 1986, the trial court entered an order in the third case sustaining the demurrer and dismissing the McGowans' motion for judgment. In September 1986, the chancellor entered an order awarding the McGowans approximately $45,000 against the Allens for damages sustained as a result of granting the temporary injunction.

We awarded the Allens an appeal (Record No. 860675) from the order denying specific performance and an appeal (Record No. 861158) from the order assessing damages against them. We awarded the McGowans an appeal (Record No. 861034) from the order sustaining the demurrer.

In the first case, the facts on the specific performance question were presented to the trial court by a 39-paragraph stipulation, ore tenus testimony, exhibits, and despositions.

There was very little conflict in the evidence.

In December 1984, the sellers granted Coldwell Banker the exclusive right to sell the property, which was to be offered at a selling price of $72,000. In the listing agreement, Betty Stough was shown as the "lister" and signed the agreement as "Sales Associate."

In February 1985, Mr. Allen was shown the property by Rush, "a real estate agent with Coldwell Banker," according to the stipulation. Allen had called Coldwell Banker's Vienna office in response to a newspaper advertisement for the property and had spoken with Rush, who was the agent on telephone duty at the time. During that month, the Allens submitted an offer through Rush to the sellers with the amount of $62,000. The sellers countered with an offer of $70,000, which the Allens rejected and made no further offer. The Allens then asked Rush to inform them if there was "any more activity" in connection with the sale of the property; Rush agreed to comply with the request. Later, Rush contacted Mr. Allen and advised him that another offer to purchase the property had been submitted, less than the Allens' first offer, and that it probably would not be accepted.

On March 10, 1985, the McGowans made an offer to purchase the property. The offer was made on behalf of the McGowans through Mary Ginty, a real estate agent employed by Jackson-Temple, Inc., realtors. Ginty dealt with Stough, the listing agent at Coldwell Banker. The sellers rejected that offer and made no counteroffer.

During the evening of March 18, 1985, the McGowans, through Ginty, made a second offer. This offer was countered by the sellers and presented to the McGowans during the early morning of March 19. That counteroffer was rejected by the McGowans who thereafter made a counteroffer. The McGowans' counteroffer was rejected by the sellers who made a second counteroffer about 10:30 a.m. on March 19. the sellers' second counteroffer was transmitted to Ginty as agent for the McGow-

ans. The McGowans directed Ginty to make a second counteroffer to the second counteroffer made by the sellers. Stough, believing that the matter was "all settled," left the area before noon on March 19 and Rush agreed to act on her behalf.

About 6:00 p.m. on March 19, Ginty called Rush and indicated "that the contract was acceptable to both parties." There was a sharp conflict in the evidence about the details of this conversation. Ginty testified that she explained to Rush that she possessed what she anticipated was an offer satisfactory to the sellers and asked if he would "assist" her in "going back to" the sellers. She asked Rush to meet her that evening to "go over the contract." Rush replied, according to Ginty, that "he didn't feel any urgency to do it that night" because "the property had been on the market for quite some time." Rush, on the other hand, testified that Ginty did not insist on discussing the matter that evening. He said that Ginty told him, "I don't want to hassle it any more tonight."

About 7:00 p.m. that evening, Rush called Mr. Allen and advised him there was further activity about the sale of the parcel and that, if he wanted to purchase the property, he should make another offer that night. About 9:00 p.m. that evening, Mr. Allen went to the Coldwell Banker office in Vienna where he met Rush. An offer to purchase was prepared for $67,000, the same amount as the sellers' last counteroffer, to the McGowans. Later that evening, Rush and Anice Sutherland, another employee of Coldwell Banker, presented that offer to the sellers; the sellers rejected it and countered with an offer of $68,000, which was accepted by the Allens. The contract in issue was executed that evening. The following day, the sellers sent a telegram to the McGowans withdrawing the outstanding $67,000 counteroffer.

Subsequently, the sellers learned that, on the night the Allen contract was executed, the McGowans wanted to present a counteroffer of $67,000 with conditions more favorable than contained in the Allen contract. The sellers concluded that

critical information had been withheld from them on the night of March 19 and decided to dishonor the Allens' contract. The sellers notified the Allens and the McGowans that the lot would be sold to whomever would pay the original listing price of $72,000.

The Allens refused to become further involved in negotiations. The McGowans, with knowledge of the Allen contract, paid the sellers the listing price and were deeded the property one day before the scheduled closing on the Allen contract.

The trial court ruled, in reusing to grant specific performace of the Allen contract, that Rush was acting as the agent of the Allens on the night of March 19. The court said that Rush was representing "two principals on the opposite side of the same transaction," that Rush's "knowledge and actions were imputed to" the Allens, and that "they were bound by his actions."

The chancellor further opined that Rush and Sutherland "failed to disclose all the facts" to the sellers material to the McGowans' negotiations. In addition, the trial court found that the Coldwell Banker agents "were acting out of a personal motive or interest" that was adverse to the sellers' interest. This was an allusion to the fact that Rush would not have been entitled to a commission unless he was the selling agent. Finally, the trial court said that the events of the night of March 19 in obtaining approval of the Allens' contract "were not only unfair but unreasonable, making the transaction unjust and inequitable."

The trial court's action in denying the Allens' request for specific performance was erroneous. This incorrect ruling stemmed form the erroneous determination that Rush was acting as the Allens' agent on March 19.

We have defined agency "as the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the agreement by the other so to act." Raney v. Barnes Lumber Corp., 195 Va. 956, 966, 81 S.E.2d 578, 584 (1954), accord Nuckols v. Nuckols, 228 Va. 25, 35, 320 S.E.2d 734, 740

(1984). The power of control is the determining factor in ascertaining the alleged agent's status. Texas Company v. Zeigler, 177 Va. 557, 564, 14 S.E.2d 704, 706 (1941).

One who alleges agency must prove it. Raney, 195 Va. at 966, 81 S.E.2d at 584. There is no presumption that an agency exists; a person legally is presumd to be acting for himself and not as the agent for another. Id. And, generally a real estate broker or agent is primarily the agent of the party who first employs him. Price v. Martin, 207 Va. 86, 90, 147 S.E.2d 716, 718 (1966).

In the present case, the evidence is undisputed that Coldwell Banker, and its employee Rush, were the agents of the sellers for the sale of the subject property. The record is devoid of credible evidence, however, to establish that Rush also was the Allens' agent. See Business Properties, Inc. v. Thomas, 187 Va. 284, 46 S.E.2d 337 (1948). There was no agreement, written or oral. Significantly, the Allens did not possess the power to control Rush's actions with relation to the property. While not determinative, Mr. Allen testified that he did not consider Rush his agent, and Rush testified that he was acting solely for the sellers and not the Allens.

Moreover, Rush's actions were consistent with the agency relationship between Coldwell Banker and the sellers. Rush merely dealt with a prospective purchaser, agreed to keep the prospect advised of sales activity, and notified the prospect when negotiations were renewed. This was conduct wholly compatible with Coldwell Banker's obligation to the seller to produce the best possible deal. As the Allens point out, the question whether Rush performed his duty as agent for the sellers is a separate issue from the question whether Rush was acting as agent for the Allens.

Consequently, because Rush was not the Allens' agent, we will reverse the decree of April 25, 1986 denying the Allens' request for relief. The sellers and the McGowans argue, however, that even if we rule Rush was not the Allens' agent, the

Allens nevertheless are not entitled to specific performance. The sellers and the McGowans say that the trial court found that the circumstances surrounding the sellers' decision to sell to the Allens "were poisoned by the fraud and misrepresentation precipitated by the greed of Rush and that enforcing a deal so made would not be equitable." We do not agree.

The failure of the sellers' agent to reveal information to them is insufficient to justify denial of specific performance to the Allens, there being no evidence that the Allens participated in Rush's alleged improper conduct. Moreover, the McGowans will not be heard to complain about the inequities of the situation when they purchased the property with full knowledge of the Allens' contract and thereafter proceeded, in the midst of pending litigation, to improve the property. Although the granting of specific performance is discretionary and not an absolute right, if the contract sought to be enforced is proved and is in its nature and circumstances unobjectionable, a court of equity should decree specific performance as a matter of course. Haythe v. May, 223 Va. 359, 361, 288 S.E.2d 487, 488 (1982).

Thus, we will remand the first case to the trial court with direction that the Allens be awarded specific performance of the contract of March 19, 1985 in accordance with the prayer of the Allens' bill of complaint. In view of this ruling, it follows that the trial court erred in the second case. Because the Allens were entitled to specific performance, the trial court property enjoined the work on the property during pendency of the litigation. Therefore, the trial court erred in awarding any damages to the McGowans against the Allens arising from the temporary injunction. Accordingly, the judgment of September 8, 1986 for the McGowans will be set aside and final judgment will entered here in favor of the Allens.

This brings us to the third case. In this action for damages brought by the McGowans against Coldwell Banker and Rush, we must state the facts, not the legal conclusions, as set forth in the motion for judgment, the demurrer having admitted the truth

of all material facts properly pleaded.

During March 1985, the plaintiffs became interested in purchasing the subject property. The sellers previously had entered into a listing agreement with Coldwell Banker, the broker, concerning sale of the property. Rush, an agent of the broker, was not the listing agent and, therefore, would not have received any commission on the sale of the property unless he was the selling agent; that is, unless he produced a ready, willing, and able buyer. The plaintiffs relied upon Jackson-Temple, Inc., and its employee, Ginty, to assist them in connection with the purchase of the property.

On March 18, after extensive negotiations, the plaintiffs submitted an offer to purchase the property to Jackson-Temple and Ginty. On that day, Ginty transmitted the plaintiffs' offer to defendants who held themselves out as the sellers' agents and the proper parties to whom all offers to purchase should be transmitted. The plaintiffs relied upon defendants to convey their offer to the sellers.

Nevertheless, defendants maliciously and intentionally failed to transmit the purchase offer to the sellers so that the entire sales commission would be received by Coldwell Banker and so that Rush would be the selling agent in connection with the sale. Alleging the defendants acted willfully, wantonly, and with intent to defraud, the plaintiffs sought an award of compensatory and punitive damages.

The plaintiffs contended that "pursuant to the rules and regulations of the Virginia Real Estate Commission [now Virginia Real Estate Board], the Defendants had a duty to convey the Plaintiffs' offer to purchase the real property to the Sellers." The regulation relied upon by the plaintiffs provides for sanctions against real estate professionals who fail "to promptly tender to the seller every written offer to purchase." § 3.5.15, Regulations of the Virginia Real Estate Commission (1984), now § 3.5.16, Virginia Real Estate Board Licensing Regulations (1987).

In sustaining the demurrer, the trial court ruled that the plaintiffs had failed to state a cause of action because, while Rush may have breached a duty to the sellers, he did not owe a duty to the prospective purchasers to communicate an offer to the sellers. The court also noted that neither actual fraud nor misrepresentation had been pled. The court further decided that ethical rules and regulations "may not provide the basis of a private cause of action under the circumstances of this case." We agree with the trial court's ruling.

Plaintiffs invite us to extend an administrative rule governing conduct of real estate agents and brokers, and to create a private cause of action in favor of prospective purchaser against an agent of the seller for whom the agent was acting as the exclusive broker. We decline the invitation. See Klotz v. Fauber, 213 Va. 1, 189, S.E.2d 45 (1972).

In reaching our decision we draw on the analysis in Ayyildiz v. Kidd, 220 Va. 1080, 266 S.E.2d 108 (1980), also relied upon by the trial court. There, a licensed physician was sued unsuccessfully for malpractice by one of his patients. The physician then filed a motion for judgment against the patient's attorney, alleging the malpractice action was prosecuted without probable cause and with malice. The plaintiff also alleged the attorney's conduct fell below the legal standards of the community and that his willful and negligent acts caused the plaintiff damages.

We affirmed the trial court's action in sustaining defendant's demurrer. Addressing the allegation of injury caused by the negligence of the attorney, we pointed out that the attorney-client relationship was between the patient and the defendant attorney, and not between the plaintiff and the defendant. We said that an attorney's liability generally is to his client if the attorney has been guilty of some dereliction of duty to the client. We noted that the attorney's primary and paramount duty is to the client. While lawyers owe a general duty to the judicial system, it is not the type of duty that translates into liability to

an adversary for negligence when there is no foreseeable reliance by the adversary on the attorney's actions. Id. at 1085, 266 S.E.2d at 112.

In addition, we stated that the rules of conduct promulgated in the Code of Professional Responsibility furnished no basis for a private cause of action. We observed, however, that disciplinary proceedings could be filed before the appropriate body against the offending lawyer. Id. at 1085-86, 266 S.E.2d at 112.

We apply precisely the same reasoning to the present case. The defendants' primary and paramount duty, as broker and broker's agent, was to the sellers, with whom they had an exclusive contract. While there may be some type of general duty to the public owed by every realtor, it is not the type of duty that converts into a liability against a seller's agent for improper conduct to one in the adversary position of prospective purchaser, where there is no foreseeable reliance by the prospect on the agent's actions. Even though the plaintiffs alleged in the conclusory averment that they relied on defendants to transmit the offer, there is no factual allegation of any direct contact or communication between the McGowans and the defendants. Indeed, there is no factual allegation that the plaintiffs even know the identify of the sellers' agent or knew that an agent of the sellers was involved. Rather, the plaintiffs alleged they relied upon Jackson-Temple and Ginty.

Consistent with the Ayyildiz rationale, the public is protected adequately from the type of misconduct asserted by the plaintiffs by administrative regulation and policing of the real estate profession. See Virginia Real Estate Commission v. Bias, 226 Va. 264, 269-70, 308 S.E.2d 123, 125-26 (1983) (real estate broker, guilty of self-dealing, had responsibility as agent of seller to communicate all offers regardless of value). The creation of a new legal duty giving rise to a private cause of action for damages should not be accomplished by judicial fiat.

Finally, we reject the plaintiffs' argument that the third party beneficiary doctrine permits them, as non-parties to the

contract between the sellers and defendants, to maintain this action. Construing the third party beneficiary statute, Code § 55-22, we have said that the doctrine "is subject to the limitation that the third party must show that the parties to the contract clearly and definitely intended it to confer a benefit upon him." Professional Realty Corp. v. Bender, 216 Va. 737, 739, 222 S.E.2d 810 (1976). There is no allegation in the motion for judgment to support a conclusion that the listing agreement in this case "clearly and definitely" intended to confer a benefit upon prospective purchasers.

For these reasons, the disposition of the three appeals will be indicated below.

Record No. 860675 — Reversed and remanded.
Record No. 861158 — Reversed and final judgment.
Record No. 861034 — Affirmed.

IN THE SUPREME COURT OF VIRGINIA

No. 860675

Edwin H. Allen, ET AL.

Respondents – Appellants,

–versus–

James Lindstrom, ET AL.

Petitioners – Appellees.

Motion to Dismiss Petition for Appeal

(August 5, 1986)

Before the Supreme Court of Virginia

IN THE SUPREME COURT of VIRIGNIA at RICHMOND

RECORD NO. 860675

EDWIN H. ALLEN, et al.,	:	
	:	
Appellants	:	
	:	
vs.	:	IN CHANCERY NO.
	:	93488
JAMES LINDSTROM, et al.,	:	
	:	
Appellees	:	
.....	:	
	:	
EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	IN CHANCERY NO.
	:	93960
TIMOTHY R. McGOWAN, et al.,	:	
	:	
Appellees	:	

MOTION TO DISMISS PETITION FOR APPEAL

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IN THE SUPREME COURT of VIRGINIA at RICHMOND

EDWIN H. ALLEN, et al.,	:	
	:	
Appellants	:	
	:	
vs.	:	
	:	
JAMES LINDSTROM, et al.,	:	
	:	
Appellees	:	
.....	:	RECORD NO. 860675
	:	
EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	
	:	
TIMOTHY R. McGOWAN, et al.,	:	
	:	
Appellees	:	

MOTION TO DISMISS PETITION FOR APPEAL

To: Edwin H. Allen
Wendy L. Allen
c/o Walter B. Golden, III, Esquire
Post Office Drawer No. 2405
9701 Main Street
Fairfax, Virginia 22031

COME NOW the Appellees, TIMOTHY R. and ADELE M. McGOWAN (the "McGowans") by Counsel, and file this Motion to Dismiss the Petition for Appeal previously served and filed herein, and in support thereof, respectfully state as follows:

1. The Order appealed from is not a Final Order.
2. The order appealed form is not an appealable interlocutory order within the meaning of Va. Code §8.01-671(B).
3. The Appellants have failed to comply with the provisions of Rule 5:11.
4. Judicial economy will be best served by permitting the trial court to resolve and finally determine all the rights and obligations of the parties.

WHEREFORE, the Appellees respectfully request that the Petition for Appeal previously served and filed herein be dismissed and that this matter be remanded to the trial court for such further proceedings or orders as may be consistent with the ruling of this Court.

TIMOTHY R. McGOWAN
ADELE M. McGOWAN
By Counsel

REES, BROOME & DIAZ, P.C.

By: _____

Henry F. Brandenstein, Jr.
Counsel for Appellees
8133 Leesburg Pike, Suite 810
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(703) 790-1911

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss Petition for Appeal, and accompanying Memorandum of Points and Authorities was served, by hand delivery, on Walter B. Golden, III, Esquire, Counsel for Appellants, at Post Office Drawer No. 2405, 9701 Main Street, Fairfax, Virginia 22031, this 5th day of August, 1986.

_____

Henry F. Brandenstein, Jr.

HFB:ahs
2208I

EDWIN H. ALLEN, et al.,	:	
	:	
Appellants	:	
	:	
vs.	:	
	:	
JAMES LINDSTROM, et al.,	:	
	:	
Appellees	:	
.....	:	RECORD NO. 860675
	:	
EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	
	:	
TIMOTHY R. McGOWAN, et al.	:	
	:	
Appellees	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE APPELLEES MOTION TO DISMISS PETITION FOR APPEAL

COME NOW the Appellees, TIMOTHY R. and ADELE M. McGOWAN, by Counsel, and in support of their Motion to Dismiss the Petition for Appeal previously served and filed herein submit this Memorandum of Points and Authorities.

Procedural Background:

On August 16, 1985, the Appellants, EDWIN H. and WENDY L. ALLEN, (the "Allens"), filed a Bill of Complaint for Specific Performance (Chancery No. 93488) with the Circuit Court of

Fairfax County. Thereafter, on September 20, 1985, the Allens filed a Bill of Complaint for a Temporary Restraining Order (Chancery No. 93960). The two (2) causes of action were consolidated for the purposes of trial.

The Allens sought to specifically enforce a contract to purchase real property and damages from James and Karla Lindstorm. The McGowans were the record owners of the real property at the time the Allens filed suit and it subsequently came to the Allen's attention that the McGowans had commenced the construction of a home on the property. Thereafter, the Allens sought and obtained a temporary injunction restraining any further construction activity.

The Lindstroms defended the suit for specific performance on the grounds, inter alia, that the contract in question had been procured by fraud. The McGowans counterclaimed against the Allens for slander of title and sought to recover delay damages against the Allens injunction bond.

The parties agreed that their claims and counterclaims would be bifurcated into two (2) hearings. The initial hearing would concern the Allens request for specific performance and the Appellees defenses thereto. The second hearing was to be held to determine the measure of damages, if any, owed to the party that prevailed at the time of the first hearing.

The initial evidentiary hearing on the issue concerning the Allens right to specific performance was held on February 28, 1986 and a letter opinion was issued by the trial court dated April 4, 1986. (See Exhibit A attached hereto). The Order appealed from was entered on April 25, 1986. (Exhibit B) A hearing on the issue of damages was held on May 30, 1986. As of the date hereof, no memorandum opinion has been issued by the Judge in connection therewith.

Argument:

I. THE ORDER APPEALED FROM IS NOT A FINAL ORDER.

Virginia Code §8.01-670(A)(3) provides that an aggrieved party may present a petition for appeal to "a final judgment in any ... civil case". A final judgment is one that disposes of the whole subject matter, gives all relief contemplated by the parties, ends the cause of action and requires no further action by the court. Burch v. Harwicke, 64 Va. (23 Gratt) 51 (1873); Gills v. Gills, 126 Va. 526, 101 S.E. 900 (1920); Ashworth v. Hagan Estates, Inc., 165 Va. 151, 181 S.E. 381 (1935); Dearing v. Walter, 175 Va. 555, 9 S.E.2d 336 (1940). In the instant case there are numerous other issues which require further action by the trial court. Therefore, the cause is not final and the matter is not ripe for appeal.

II. THE ORDER APPEALED FROM IS NOT AN APPEALABLE INTERLOCUTORY ORDER.

Va. Code §8.01-670(B)(3) provides that in a chancery proceeding an aggrieved party may present a petition for appeal from any interlocutory decree "adjudicating the principles of a cause".[1]

The meaning of the applicable statutory provision is not subject to precise definition. However, a general standard of review has developed concerning the extent of an aggrieved party's right to appeal from an interlocutory decree that "adjudicates the principles of a cause."

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[1] The provisions of Va. Code §8.01-670(b)(1) are not applicable since the Allens assert at page 6 of their Petition for Appeal that they voluntarily dissolved the injunction. See generally, Hounshell v. Hounshell, 116 Va. 675, 82 S.E. 689 (1914).

In Lancaster v. Lancaster, 86 Va. 201, 9 S.E. 988 (1889), the court held:

> It is difficult, if not impossible to define exactly what is meant by adjudicating the principles of a cause in such a way as to fit every case; but it must mean that the rules or methods by which the rights of the parties are to be finally worked out have been so far determined that it is only necessary to apply these rules of methods to the facts of the case in order to ascertain the relative rights of the parties with regard to the subject matter of the suit. 86 Va. at 204-205, 9 S.E. at 990; cited with approval in Thrasher v. Lustig, 204 Va. 399, 131 S.E.2d 186 (1963).

The order appealed from decides only one issue: the Allens are not entitled to specific performance. The remainder of the controversy between the parties is left unresolved and the trial court's order has not established any rules or methods by which the case can be finalized. When the court determines a preliminary question but leaves the rest of the case for further action by the court, the preliminary determination has not adjudicated the principles of the cause. Cf. Lee v. Lee, 142 Va. 244, 128 S.E. 524 (1925).

III. THE ALLENS HAVE FAILED TO COMPLY WITH RULE 5:11.

Rule 5:11(a) requires that the transcript of a proceeding be filed with the clerk of the trial court within sixty (60) days after entry of judgment. Rule 5:11(b) requires counsel for the appellants to promptly notify all other counsel of the date on which the transcript is filed. Compliance with the provisions of the Rule is mandatory and failure to comply constitute a jurisdictional bar to the prosecution of the appeal. Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976). The Allens have failed to comply with the provisions of Rule 5:11

and their Petition for Appeal should be dismissed.

V. JUDICIAL ECONOMY REQUIRES THE DISMISSAL OF THE PETITION FOR APPEAL.

As of the date hereof the trial court has not issued any opinion concerning the issue of damages. Indeed, the trial judge has indicated that he may await a final determination of this Court before taking any further action.

Assuming, arguendo, that the Allens Petition for Appeal is properly perfected, and that a Writ of Appeal is subsequently denied, then the trial court will issue an opinion on the issue of damages, Thereafter, any party aggrieved by that order, it clearly being a final order, will have a right to petition for appeal. In such event, this Court will be asked to consider the issues raised by this case sequentially rather than simultaneously. Such a result will cause a multiplicity of appeals and necessarily increase the costs and expenses incurred by each of the parties hereto. For these reasons, this Court should now dismiss the Petition for Appeal as premature.

Conclusion:

The Order appealed from is not a final appealed order. Similarly, the Order appealed from does not adjudicate the principles of the cause and there are many issues yet to be decided by the trial court. Finally, judicial economy requires that this Court dismiss the Petition for Appeal at this time.

TIMOTHY R. McGOWAN
ADELE M. McGOWAN
By Counsel

REES, BROOME & DIAZ, P.C.

By: _____

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IN THE CIRCUIT COURT OF FAIRFAX COUNTY

No. 93488
93960

Edwin H. Allen, ET AL.

Respondents – Complainants,

–versus–

James Lindstrom, ET AL.

Petitioners – Defendents.

Letter Opinion of the Circuit Court Judge

(April 4, 1986)

Before John J. Karcha,

Circuit Judge Pro Tempore

John J. Karcha
Attorney and Counsellor at Law
3989 Chain Bridge Road
(P.O. Box 1008)
Fairfax, Virginia 22030

Leigh Building
(703) 385-5711

April 4, 1986

Walter B. Golden, III, Esq.
P.O. Box 2405
Fairfax, VA 22031

Henry F. Brandenstein, Jr., Esq.
8133 Leesburg Pike, Suite 810
Vienna, VA 22180

Re: Allen et al, vs. Lindstrom et al, Chancery No. 93488
Allen et al, vs. McGowan et al, Chancery No. 93960

Gentlemen:

After reviewing the pleadings in these causes, the Pre-Trial Order with Stipulation of Facts attached, the ten (10) Joint Exhibits, the Complainants' Exhibit, the Defendants' Exhibit, the Hearing Transcript of February 28, 1986, the Trial Briefs, the Post-Trial Briefs, and after considering the demeanor of the witnesses, the Court is of the following opinion:

The Defendants, James and Karla Lindstrom, entered into a Listing Agreement with Coldwell Banker Realtors to sell their real property known as Lot 33, Acredale Subdivision, Fairfax County, Virginia. Betty Stough was the listing agent.

Max Rush, a real estate agent with the same Coldwell Banker Office, was acting as the agent for the Complainants, Edwin and Wendy Allen, and was acting on behalf of and sitting in for Betty Stough on the evening and night of March 19, 1985. Then and there, Mr. Rush was acting for two principals on the opposite side of the same transaction. As agent for the Allens, his knowledge and actions were imputed to them, and they were bound by his actions.

Mr. Rush and Anice Sutherland, the Branch Manager and Officer of Coldwell Bank, on the evening and night of March 19, 1985, did not exercise the utmost good faith towards the Lindstroms, in that they failed to disclose all the facts, especially with respect to the McGowans' negotiations and contract, which were material to the Allens/Lindstroms transaction, which would have influenced the Lindstroms in deciding a course of action. The Lindstroms had the right to assume that when they employed Coldwell Banker Realtors, unless advised to the contrary, that these real estate agents were in a situation to give them, as principals, undivided allegiance and loyalty which the proper performance of the agency requires. Yet the Lindstroms on this night were practically unrepresented and the agents were acting out of a personal motive or interest that was adverse to the Lindstroms' interest.

Upon consideration of all the circumstances of the case and especially the events of the evening and night of March 19, 1985, the actions in obtaining the signatures and approval of the Allens' contract were not only unfair but unreasonable, making the transaction unjust and inequitable.

The Court is of the opinion that upon the facts of this case, and in the exercise of sound discretion, it should decline relief by the exercise of its power of specific performance with respect to the Allens/Lindstroms contract dated March 19, 1985.

For the reasons stated by Court denies the prayer of the Bill for specific performance. A decree may be prepared accordingly, making this opinion a part of the record.

Very truly yours,

John J. Karcha

Judge Pro Tempore

JJK/diy

cc: Warren Barry, Clerk

VIRGINIA REAL ESTATE BOARD

No. 85-01684

Virginia Real Estate Board

Complainant,

–versus–

Max Rush and Anice Sutherland,

Respondents.

Findings of Fact and Conclusion of Law

(September 7, 1988)

Before Virginia Real Estate Board

VIRGINIA: BEFORE THE REAL ESTATE BOARD

VIRGINIA REAL ESTATE BOARD,)		
	)	
Complainant	)	
	)	
vs.	)	File No. 85-01684
	)	
MAX RUSH, and	)	
	)	
ANNA SUTHERLAND	)	
	)	
Respondents	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A formal Administrative hearing was held on July 12, 1988 at 10:00 A.M. and resumed on July 13, 1988 at 10:00 A.M., pursuant to a Notice of Hearing dated June 9, 1988, authorized by Sec. 9-6.14:12. Code of Virginia (1950) as amended, and the rules and Regulations of the Virignia Real Estate Board. The hearing was held at the Tyson's Westpark Hotel, 8401 Westpark Drive, McLean, Virginia, and all parties hereto were present throughout the proceedings.

FINDINGS OF FACT

1. Max Rush is licensed by the Virginia Real Estate Board to act as a real estate salesman, and Anice Sutherland is a licensed Associate Broker (Exh. 10).
2. James D. Lindstrom and his wife Karla Lindstrom listed lot 33, an unimproved lot in Acredale Subdivision, in Fairfax County with Coldwell Banker through Stough, an agent of Coldwell Banker on December 17, 1984, at a selling price of Seventy-two Thousand Dollars ($72,000.00) (Exh. 1).

3. On February 14, 1985, Edwin H. Allen and Wendy L. Allen (the Allens) made an offer on the Lindstrom's property through Rush, an agent of Coldwell Banker. The offer was rejected but the Allens asked Rush to keep them apprised of the status of the property (Tr. 48 and Exh. 12).
4. On March 18, 1985, at approximately 7:00 P.M., Timothy R. McGowan and Adele M. McGowan with Mary S. Ginty, an agent of Jackson Templeton Realty, drafted an offer for the Lindstroms' property (Tr. 129).
5. Ginty and E.B. Stough of the Coldwell Banker offer in Vienna presented this offer to the Lindstroms at 10:30 on the night of March 18, 1985. Negotiations were conducted until 12:30 in the morning of March 19th resulting in a counter offer from the Lindstroms. Mrs. Lindstrom initialled the counter offer in the morning which was delivered to Ginty at about 7:00 A.M. on March 19th. (Tr 51-54, Tr. 2-132.)
6. Ginty reported the counter offer to the McGowans by telephone who made a verbal change to the counter offer early on the morning of March 19. This change was reported to the Lindstroms orally about 9:30 A.M. The changes were agreed to orally and Ginty was to insert the changes in the contract and bring the document back to the Lindstroms to be initialed by them that day (Tr. 2-133, 2-197).
7. After this series of oral exchanges. Stough through there had been a meeting of minds requiring only an initialling of the written amendments so she left for North Carolina and designated Rush from her agency to follow through on the delivery of the documents (Tr. 2-137, Tr. 2-197).
8. On the morning of March 19 the Lindstroms concluded that the contract offered by Ginty did not embody the terms agreed to earlier, so they changed and initialled the contract at about 10:30 A.M. (Tr. 2-134).
9. Ginty took the changed contract back to the McGowans for approval. Mrs. McGowan initialed the change but when Ginty returned to the McGowans at 5:30 P.M. Mr. McGowan

refused to initial the change and asked Ginty to take the offer back to the Lindstroms (Tr. 2-20,21, Tr. 2-136).

10. At approximately 6:00 P.M. Ginty called Rush at home and advised him that there was a problem with respect to the contract (Tr. 2-137). Ginty testified that she asked to meet with Rush to seek to resolve the differences of the offer and that Rush stated that he would not go back to his office that night and since there was no urgency, he would meet with Ginty at his office the next morning on March 20th (Tr. 2-138). Rush's testimony as to the substance of the conversation denies that Ginty mentioned a counteroffer or that she requested to meet with the sellers (Tr. 2-225). Even if we accept Rush's version of the conversation it is clear that he was put on notice that there was a prospective purchaser interested in the land who in fact was well known to Rush's firm because of the negotiations participated in by Stough. In fact in the call later that evening with Allen, Rush told Allen that a "contract is working" (Tr. 2-215). The argument made by Rush (Para. 16 of Respondent's Proposed Findings of Fact) that Ginty should have contacted Rush's manager applied only if "Ginty had thought Rush was not complying with any request she had made ...". Ginty, apparently from the tenor of Rush's response to her call, had no reason to believe that an appeal to higher authority was necessary.
11. After this conversation, Rush called his managing broker, Sutherland, told her about this conversation with Ginty and asked if he could contact the Allens. She told him that he could contact the Allens (Tr. 2-215, 2-222).
12. Rush called Allen and told him that a "contract is working" and if he still was interested "he should make an offer ..." (Tr. 2-215.
13. Rush, Sutherland and Allen met at 9:00 P.M. on March 19 at the Coldwell Banker office and drafted an offer for the Lindstroms' property (Tr. 2-216).

14. After the offer was prepared that evening Sutherland called the Lindstroms and arranged to meet with them. Mr. Lindstrom inquired about the McGowan offer, to which Sutherland answered that she didn't know anything about it (Tr. 63.155, 165).
15. When Rush and Sutherland arrived at the Lindstroms' home about 9:30 P.M. on March 19, to present the Allen offer, Mr. Lindstrom again asked about the status of the McGowan contract (Tr. 64, Tr. 2-217). Sutherland responded that they did not know the status of the contract (Tr. 64, Tr. 2-217).
16. Lindstrom, believing that the McGown contract had fallen through, thought that the Allen contract was his only hope to sell the property (Tr. 61, 167).
17. Lindstrom made a counter offer by raising the price by $1,000 (Tr. 2-219).
18. Rush promptly called Allen at his home and arranged to meet Allen at the Key Bridge Marriott Hotel in order to present the Lindstrom counter offer (Tr. 2-220). Allens accepted the counter offer at about 11:00 P.M. on March 19 to constitute an effective contract (Tr. 104, and Exh. 3).
19. Sutherland called Ginty at about 11:10 P.M. the same evening of March 19, 1985, to inquire about the McGowan contract. Sutherland told Ginty that the property was sold (Tr. 139).
20. If the Allen contract had been carried out, Rush would have received a commission. If the McGowan contract had been carried out, Rush would not have received a commission (Tr. 2-181).

CONCLUSIONS OF LAW

Max Rush and Anice Sutherland are charged with violating the following four Virginia Real Estate Board Regulations:

3.5.6 Acting for more than one party in a transaction without the knowledge of all parties for whom the licensee acts;

3.5.15 Failing as a licensee to promptly tender to the seller every written offer to purchase or obtain the property involved.

3.5.27 Making any misrepresentation;

3.5.35 Being unworthy or incompetent to act as a real estate broker or salesman in such a manner as to safeguard the interests of the public, or otherwise engaging in improper, fraudulent, or dishonest conduct.

Did Rush and Sutherland, who were agents of the Lindstroms by virtue of their representation of Coldwell Banker, breach their fiduciary duty to their principals for their personal benefit, by failing to tell the Lindstroms of the existence of a counteroffer by the McGowans on the evening of March 19, 1985?

There is an absolute duty " ... imposed by law upon the fiduciary, to disclose anything known to him which might affect the principal's decision whether or how to act ..." Owen v. Shelton, 221 Va. 1051, 1054 (1981) (Emphasis added).

It is clear that Rush knew the McGowans were interested enough in the Lindstrom's property to have negotiated to a point where their colleague Stough regarded the deal as closed as far as substantive matters were concerned. And as late as 7:00 PM of March 19, 1985 Rush was told in a telephone that Ginty had

a counteroffer from the McGowans and wanted to see Rush and Lindstroms. Ginty testified that Rush told her there was no rush that Ginty could come to his office in the morning. While Rush denies the detail of the conversation, it is clear that he was on notice that there was a serious offer for the Lindstrom's consideration because he told Allen that a "contract is working". But when Mr. Lindstrom asked about the McGowan contract later that evening Sutherland answered that she didn't know anything about it and Rush remained silent.

There is a ready explanation and motive for Rush's actions. He would make a personal gain by earning a sales commission if the Allen contract was concluded and none if the McGowan contract went to settlement.

The argument that the Allen contract was a better contract does not relieve Sutherland nor Rush of their fiduciary duty to disclose all information.

> "The presence or absence of 'detriment' to the seller, caused by ... non-disclosure, is irrelevant. A broker's duty to communicate an offer promptly to the seller is absolute. It does not depend upon the broker's evaluation of the offer as advantageous or otherwise. That decision is the seller's alone." Virginia Real Estate Commission v. Bias, 226, Va. 264. 269-270 (1983).

The failure to present the McGowan counter offer made more egregious by the haste with which the Allen offer was presented, constituted a violation of regulation 3.5.15.

When Lindstrom asked about the status of the McGowan offer and Rush and Sutherland did not disclose Rush's earlier telephone discussion nor that the "contract is working", this constituted a misrepresentation in violation of Regulation 3.5.27. Had Lindstrom been aware of the counteroffer of McGowan he could have entered into a "bidding war", which conceivably

would have resulted in a more advantageous contract for the Lindstroms. In actuality, the McGowans did at a later time bid and bought the Lindstrom's property at a significantly higher price (Tr. 190).

By disclosing to Allens the pendency of the McGowan offer, while they withheld that information from their principal Lindstrom, Rush and Sutherland favored the interest of Allen and not Lindstrom. This was done without informing Lindstrom of their interest in the Allen contract. This violated Regulation 3.5.6.

There is substantial evidence form the activities described in the Record that both Rush and Sutherland violated Regulation 3.5.35 because they acted improperly.

September 7, 1988

Paul Reiber
Hearing Officer